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In The

Supreme Court of the United States

No. . . . . .

OTTO REFIOR,

Petitioner,

v.

LANSING DROP FORGE COMPANY, a Michigan Corporation, EMIL M. REFIOR, EDWARD H. REFIOR and ALVA M. CUMMINS.

BRIEF FOR PETITIONER.

OPINION.

Opinion was rendered in the United States Court of Appeals for the 6th Circuit on January 5, 1942 (R. . .) and is reported in *124 Fed. (2), page 440.*

JURISDICTION.

Statement of grounds on which the jurisdiction of the court is invoked is contained in Petition for Certiorari on pages 5-7.

STATEMENT OF CASE.

Statement of the case is covered in Petition for Certiorari on pages 10-22.

SPECIFICATION OF ASSIGNED ERRORS.

Specification of assigned errors which are intended to be urged is contained in Petition for Certiorari on page 23.

ARGUMENT.

I.

Petitioner Was Entitled To a Trial In Open Court. Charges Of Wrongful Conduct, Based On His Motion To Revoke Reference, Were Not Justified.

Petitioner was entitled to a trial in open court. His action in trying to obtain such a trial was not open to charges of wrongful conduct.

Rule 53-b which incorporates old Rule 46 of the Federal Rules of Civil Procedure requires that in trials in equity,

> "The testimony of witnesses shall be taken orally in open court except as otherwise provided by statute or the rules and that the court shall pass upon the admissability of all evidence offered as in actions at law."

This court held in *Los Angeles Brush Manufacturing Company v. James, 272 U. S. 701, 47 Sup. Ct. 286,* that the mere fact that the court docket is crowded is not such an exceptional condition as will justify a reference to a master in an equity case.

In re Irving Austin Building Corporation, 100 Fed. (2) 574, 577 (C. C. A. 7), the court said:

> "A fraud issue, ordinarily, is not a proper one

for reference to a special master. Perhaps it would be better to say, issues in fraud hearings are not the proper subject for reference to a special master, save in extraordinary and exceptional cases.

"And exceptional means the rare—the unusual case or circumstances. The rule is more than an academic pronouncement. It demands application."

• • •

"The evils of delay and added expense are both inherent in references."

The reference made by the court was a general reference and not a reference limited to questions of accounting (R. 78 to 80). The audits of each side were already prepared (R. 148, 154). The credibility of the witnesses was involved, including the credibility of the parties to the litigation. Fraud allegations are set up on one side and denied on the other (R. 1 and 40).

A hearing before the master would have been productive of much unnecessary expense and burden to the plaintiff.

The petitioner accordingly took a stand throughout the litigation (even though originally consenting to a reference in 1936 when defendants objected) that the case should be tried in open court (R. 147, 152, 156). Defendant's counsel as far back as 1938, knew this (R. 156).

In view of the established rules entitling petitioner to a trial in open court in the case at bar, petitioner did not merit the serious charges made against him by the District Judge, on account of his motion to revoke.

To summarize, the District Judge accused petitioner of committing a fraud on the court in getting a reference, of fooling the court, of dilatory tactics, of maintaining a vexatious litigation of condoning certain alleged wrongs committed by petitioner's general counsel as follows: Telling an alleged untruth to the court as to said reference, alleged breach of ethics, alleged sharp practice and semi-sharp practice, and giving the court the "run around." These charges of wrongdoing were without foundation in fact, and will now be referred to, in detail.

The hearing on motion to revoke reference was held May 12, 1941 (R. 147).

In opening the argument on the motion to revoke reference, petitioner's general counsel made the following statement:

> "The order, as I understand, was made without either the plaintiff or his general counsel being apprised thereof in advance, without an opportunity on our part to present facts against the making of the order" (R. 146, 147).

Thereupon the court said:

> "You might as well start off on the right foot. That is not true" (R. 147).

> "The Court: When the defendant found out I was going to be away during part of February and could not take the case on at that time, he consented to it. I thereupon suggested to the plaintiff, in view of the fact that he wanted this case referred, that he prepare the order of reference.

"The order of reference was not prepared, and then the defendant's counsel came to me and said they don't want to refer it now. I said, it is too late; it will be referred.

"So when you start out and say it was done without your consent, you start out on the wrong foot, and I would advise you to start out on the right foot with this court."

"Mr. Schullman: Now, in order to clarify the record, may I state, and with this court's indulgence, that we do not know what occurred here, but we do know this, that it was made without my consent as general counsel, it was made without the consent of plaintiff.

"Now, we contend that there are no facts in this case which either require a reference to a master or which can (R. 147) be considered exceptional within the decisions that have been handed down by the United States Supreme Court on this matter.

"This is an action wherein the plaintiff charges fraud in the misappropriation of funds, allegedly against the defendants. Two audits have been taken by both sides. They are completed. The audits are intermingled with the issue of fraud. We cannot extricate the audits, nor can we extricate the question of fraud.

"These are matters only and solely for a trial judge to determine.

"Furthermore, on the issue of fraud and the allegations, the plaintiff desires and wants a trial court who will have the opportunity of having first-hand observation of the parties involved, who will have to determine that issue of fraud" (R. 148).

"The Court: But start out with the right facts. You will find yourself in better grace with the court if you don't try to fool the court" (R. 153).

"Mr. Schullman: Your honor, we are not trying to fool the court, and the inference would be I personally suggested the master be requested" (R. 153).

* * *

"Mr. Schullman: We are not finding fault with them (referring to the local trial counsel), but we do say this, we have not only requested, I think my letters have always insisted upon one thing, and that is that at no time should there be anything but a trial by a judge; at no time" (R. 154).

"The Court: And I sent it to the Master at your request."

"Mr. Schullman: Your honor, I will have to specially individuate" (R. 152).

"The Court: Never mind getting into that, you can't play fast and loose with this court" (R. 152).

"Mr. Schullman: There was no authority given to any counsel at any time, but they had no right to deprive the plaintiff—in fact, it is my belief I had no right to deprive the plaintiff of a substantial right."

"The Court: All right. If I have made a mistake, if I should hear this case after sending it to the Master at your request, I am willing to be shown" (R. 152, 153).

The judge explained what he had in his mind in a statement dictated into the record on July 7, 1941, at which time he said that petitioner obtained a reference

(actually referring to local counsel who consented to a reference) until the court had left the city on a short vacation and as soon as the court had left, the petitioner made a motion to revoke the reference knowing that the motion would not come up for hearing until the court returned some weeks later; and the court further stated on the record that it was apparent, plaintiff was being dilatory in his tactics (R. 228, 229).

A charge that a fraud had been practiced upon the judge, that petitioner was guilty of dishonest conduct, that petitioner's general counsel was trying to fool the court, and that petitioner condoned these "tactics" (R. 187) is indeed serious for a litigant who has to appear before that judge in a case involving that litigant's credibility. How could petitioner reasonably expect to get an impartial hearing, when he is condemned in advance as a dishonest person, before any testimony has been taken?

The judge in advance of the trial, and with nothing to support his charges, stated in effect that the petitioner had fraudulently obtained a reference to a master, with a view to delay trial, and that petitioner had "fooled" the court. These charges were followed by other charges of dishonesty.

The District Judge then stated that he had discussed the case with one of his associate judges, and had unwillingly arrived at the opinion that petitioner did not want to try his case for some reason or other (R. 193, 194).

The record shows that said opinion of the court, was, in fact, a fixed opinion, and this is proved by the many other remarks indicating the same opinion expressed at other times.

We now refer to the Griffin, Heal & Emery matter, where the District Judge again made serious charges against the honesty of petitioner.

The Griffin, Heal and Emery Matter. Petitioner's Trial Counsel Was Restrained From Going Ahead With the Trial. Charges Of Wrongful Conduct On That Matter Were Not Justified.

In 1937, Messrs. Griffin, Heal & Emery had been retained by petitioner as local trial counsel (R. 95, 96). At a later date Messrs Atkinson and Donnelly became petitioner's local trial counsel. Petitioner had entered into a written contract with Griffin, Heal and Emery, which contract was contained in a certain letter dated April 1, 1937 (R. 95, 96).

According to the terms of the Griffin, Heal and Emery contract as contained in said letter, it was provided as follows:

> "It is expressly understood that you are to assume responsibility for the conduct of the preparation for trial and at the trial of the pending litigation, although I, of course, cannot expect you to guarantee the successful outcome thereof. Signed: Otto Refior."

These terms were accepted by Griffin, Heal and Emery in their letter of acceptance dated April 1, 1937 (R. 96).

When it came time for trial, the law firm of Griffin, Heal and Emery did not desire to undertake the trial by themselves, and breached their contract under which they had undertaken to try the case, and demanded that associate trial counsel be hired by petitioner to conduct the trial with them. By reason of these demands of Griffin, Heal & Emery, petitioner was obliged to hire other trial counsel. Whatever preparations had been made for trial by Griffin, Heal & Emery, were now valueless in view of the fact that petitioner's new counsel was obliged to make complete preparation of the entire case, with a consequent duplication of the work of preparation.

Petitioner rightly took the position that Griffin, Heal and Emery had breached their contract (R. 100) and that petitioner had a set-off against them for the full cost of preparation.

On April 29, 1941, when petitioner's suit was about to come up for hearing in the District Court, Griffin, Heal & Emery filed a petition in petitioner's suit, demanding payment of three thousand two hundred forty-five ($3,245.00) dollars in cash for alleged fees, and praying for an order restraining petitioner from using other trial counsel in his case (R. 90-97).

On April 29, 1941, the District Judge ordered petitioner to deposit three thousand two hundred forty-five ($3,245.00) dollars in cash, the amount claimed by Griffin,

Heal and Emery for services, "as security for any amount found to be due said attorneys for services under their contract with plaintiff as may be finally determined in a proper legal proceeding" (R. 98).

On April 30, 1941, the court entered its order restraining petitioner's new trial counsel, Messrs. Atkinson and Donnelly from further appearing in this cause as local counsel in behalf of petitioner (R. 97) pending deposit of said three thousand two hundred forty-five ($3,245.00) dollars. On May 12, 1941, Mr. Griffin agreed to accept a bond in place of the requirement of the cash deposit (R. 164). Mr. Griffin said:

> "Your honor has already entered an order in this case that he will deposit so much money. It is satisfactory to me in lieu of the money he put up a bond to comply with that order.
> The Court: All right" (R. 164).

Petitioner filed a bond which complied with the court's order (R. 137-138).

Notwithstanding the bond was filed in compliance with the court's order as to cash deposit, and pursuant to Mr. Griffin's agreement made in open court to accept a bond which would comply with such order, Mr. Griffin appeared in court on June 16, 1941, and took exception to the bond, and objected to having Atkinson and Donnelly go ahead with the trial as petitioner's trial counsel.

In the course of a colloquy had in open court, certain changes in the bond were demanded by Mr. Griffin and

those changes were designated as "a," "b" and "c," changes (R. 173, 174, 175). Petitioner conceded the changes.

Thereupon the court said:

> "The court will prepare an order withdrawing that bond and substituting a new one in its place and clean it up so that there will be no question that you will have this court hear it, and if it is to be a jury trial, I don't think I can settle that now" (R. 175).

The court did not prepare any order withdrawing the filed bond, and providing the changes to go into the new bond. The court did not prepare an order substituting a new bond in the place of the one on file. The matter was left without an order of any kind. The terms of a substitute bond not having been fixed by court order, it could not be filed, and it was not filed because the court saw fit to dismiss petitioner's case before anything further could be done to lift the restraint against new trial counsel in the case.

Thus the changes to be made on the bond were not fixed by court order, new bond could not be filed without the specific changes, no law firm could be engaged as new trial counsel, and the restraining order was not dissolved.

Adding to this confusion, the court then gave petitioner's trial counsel, Atkinson and Donnelly permission to withdraw from the case at a time, when the trial was to begin, (and without petitioner's consent (R. 179)

and ordered petitioner's nonresident general counsel to go ahead with the trial notwithstanding the court was advised that petitioner's nonresident general counsel had left the detail of the preparations for trial, to Atkinson and Donnelly (R. 180), who were ready.

In these proceedings the court said:

> "I didn't know at that time that you had resorted to what I thought were unfair unethical practices in not paying a local attorney and getting somebody else."
>
> "Mr. Schullman: Pardon me, your honor, you don't mean I—"
>
> "The Court: One minute it is you and one minute it is somebody else. * * * You didn't pay the other attorney but you got somebody else, and I don't know about that." * * *
>
> "Mr. Schullman: Now I take issue again with the last remarks about the unethical situation. I don't know whether this court has had the benefit of all the facts involved and that is not part of this argument" (R. 153).

At another stage of the proceedings the court said as to petitioner:

> "The Court: I don't care how you do it. All I am interested in is to know that clients can't come in this court and run from one attorney to another, and not pay the fellow they had in the first place."

"Mr. Schullman: If your honor would like to hear the facts on it very briefly—"

"The Court: Listen, I can't try his case" * * * (R. 163).

Bond had been filed which complied with the order for deposit of the cash (R. 137, 138).

Petitioner filed the bond with the court clerk before court closed on June 16, 1941, to comply with verbal order of the judge to have the bond on file that day.

The next day, June 17, 1941, Mr. Griffin objected to petitioner's trial counsel proceeding with the case until the "proper" bond is filed (R. 168).

No doubt the District Judge was trying to put petitioner's case into a condition which would allow it to be tried. But his proposed order fixing the terms of the bond was not entered, and that left the Griffin, Heal & Emery claim as a stumbling block which prevented petitioner from getting other trial counsel.

On the one hand petitioner was restrained. On the other hand, petitioner was ordered to go ahead with the trial. If petitioner went ahead, he was guilty of violating the code of ethics. If he didn't go ahead, he would be thrown out of court.

Again, petitioner's general counsel is resident in California, and is a practitioner in that state. He could not remain in Detroit, and go to Lansing and other points,

and hire experts in foundry and forge practice, and do those numberless things required in the preparation for trial, for the simple reason that preparation and prosecution of the case would involve some weeks, and petitioner's general counsel should not be penalized for his inability to move from California to Detroit to prepare this case for trial, for which task, he was always compelled to have local trial counsel. He had Earl Davis until Davis got sick. Miller, Canfield, Paddock & Stone temporarily took Davis' place and thereafter Griffin, Heal & Emery took over the case up to the point at which Atkinson & Donnelly prepared for the hearing. These attorneys acted as petitioner's trial counsel.

We submit it was an unjust and oppressive exercise of the lower court's powers, to order a nonresident general counsel from California, to proceed to trial, and particularly when Griffin, Heal & Emery had pending certain objections which might be applicable until the court fixed the form of the release bond.

Then at the session of the court held in the afternoon of June 17, 1941, the court charged petitioner with having had eight different firms of local attorneys which was not a fact (R. 188), and speaking to Mr. Schullman, petitioner's nonresident general counsel, the court said:

> "The Court: Well, Mr. Refior has borne with you through seven or eight firms of attorneys and I don't know as he wants to change his tactics now" (R. 187).

The court likewise in said afternoon session of court on June 17, 1941, stated to petitioner's nonresident general counsel:

> "You ask this court to disqualify itself, after this

court called you for what he believed to be a violation of the ethics of this court and I am mindful that some courts would not have been as lenient as this court with you" (R. 197, 198).

We shall summarize the charges of dishonesty made against petitioner, none of which is supported by the record.

1. That petitioner deceived the court (R. 147).

2. That petitioner did "run around from one attorney to another and not pay the fellow they had in the first place" (R. 153).

3. That petitioner's general counsel was guilty of "semi-sharp practice" (R. 168).

4. That petitoner's general counsel was guilty of "rather sharp practice" (R. 177).

5. That petitioner's counsel would find himself in better grace with the court if he would not try to fool the court (R. 154).

6. That petitioner's counsel could not play fast and loose with the court (R. 152).

7. That petitioner had borne with his general counsel through seven or eight firms of attorneys and "I don't know as he wants to change his tactics now" (R. 187).

8. That petitioner and his general counsel resorted to unethical practices (R. 153).

The foregoing are charges of dishonesty, of unethical practices and of sharp practice, committed or condoned.

These charges were a prejudging of petitioner, adverse to his honesty and his business ethics. The court's remarks were likewise a prejudging of the honesty and professional ethics of petitioner's general counsel adverse to that counsel and without support in the record.

The charges were serious, they were personal, and they constituted a fixed opinion of the court adverse to petitioner.

The fact that the court kept on repeating the charges of breach of ethics, and sharp practice, and deceit of the court, indicates in no uncertain way, that the court's adverse opinion of petitioner, was a fixed opinion.

That fixed opinion was formed before any evidence had been submitted by anyone. It was a prejudgment, and constituted bias and prejudice within the meaning of the law.

II.

Due Process Entitled Petitioner To a Hearing Before An Impartial Tribunal. The District Judge Should Have Been Disqualified.

1. The words "due process of law" as contained in the Fifth Amendment to the United States Constitution were intended to convey the same meaning as the words "by the law of the land" in Magna Carta. *Murray v. Hoboken Land Company, 18 How. 276; Ocho v. Hernandez, 230 U. S. 139.*

Perhaps no definition is more often quoted than that given by Mr. Webster in the *Dartmouth College Case*, "'By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial.'" *Taylor on Due Process, page 472.*

> "The tribunal must be an impartial one." *12 Am. Juris Pr., page 326, Sec. 635.*

> "Due process of law requires a judicial determination of the issues by an impartial tribunal," * * * *12 Corpus Juris 1225, Sec. 1001.*

In *Cook v. United States, 267 U. S. 517, 530*, this court said in reversing the lower court's judgment of guilt:

> "There was marked personal feeling that did not make for an impartial and calm judicial consideration and conclusion."

The record in the case at bar shows that the District Judge, in advance of trial, had a fixed opinion. We submit that that opinion disqualified him. The record clearly shows prejudice in the sense that the petitioner-plaintiff and his rights were prejudged. Prejudice here used, has to do with the court prejudging a litigant—with passing on the honesty of a litigant and the good faith of his suit, before the evidence is before the court—with passing on the case without reference to the evidence. Where a court has a fixed opinion in advance of the hearing, that court ceases to be an impartial tribunal.

In *Tegler v. State of Oklahoma, 130 Pac., page 1164, 1171*, the court said:

> "Prejudice means pre-judging of the case from any cause; it means a settled and fixed opinion either as to the guilt or innocence of an accused. One who has prejudged a person's guilt has a prejudice against such person. This is not necessarily an emnity or ill will against him. The statute excludes any person who had made up his mind or formed a judgment in advance in favor of either side. *Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 297.* Prejudice means prejudgment, judgment before hand."

In *Evans v. Superior Court, 290 Cal., pages 662, 666*, suits were filed against a number of individual defendants, in a group of actions for recovery of damages. After the first case had been completed the court made an order continuing the other cases. In the proceedings on making such order, the judge stated that there had been no wilful misstatement of fact on the part of any witness with the exception of the statements of John A. Evans and his brother. The trial judge stated that he was sat-

isfied from the evidence, that those two witnesses (the Evans brothers) had entered upon a course of dealings which would have done credit to a Captain Kidd. When the subsequent case against the Evans brothers came up for trial, upon the filing of an affidavit of prejudice, to disqualify the judge who heard the first case and made the above statements, it was held that the judge was disqualified to sit on the trial of the Evans brothers.

He had charged the Evans brothers with having made wilful misstatements. His charges were held to amount to an opinion about the Evans brothers and their dealings, and prejudged the Evans brothers. The judge was held to be disqualified.

In *People v. Lennon, 200 N. Y. App. Div. 510, 512,* one Watkins, was dismissed by a magistrate on a charge of disorderly conduct brought by a police officer named Lennon. After Watkins was released, Officer Lennon was placed under arrest because Watkins had been found to be covered with a mass of black and blue spots which gave evidence that he had been beaten by Lennon. Lennon was charged with assault and battery.

Patrolman Lennon was to have been tried by the same magistrate who discharged Watkins.

On the day that Watkins was discharged, the magistrate stated that he had found Watkins a mass of black and blue spots which gave evidence that he had been badly beaten and that Lennon and his co-officer had committed perjury on the trial of Watkins; the judge also stated that there was no question in the judge's mind that the prisoner had been assaulted and beaten by Lennon.

Lennon made a motion to have the magistrate disqualify himself on account of these statements. The motion was denied, the magistrate stating that he was able to decide the case impartially. On appeal it was held that the judge's remarks constituted a fixed opinion by the court which disqualified the judge from sitting on the *Lennon case.* The judge was accordingly ordered to disqualify himself.

In *Hearn v. Miller, 33 Pac. Reporter (2) Oklahoma, page 506,* the judge was held to be disqualified:

The court said in that case:

> "Without going into detail, the record clearly indicates such attitude of the respondent toward the petitioner as would cause any person similarly situated to entertain the gravest doubts of receiving that fair and impartial trial without bias or prejudice which is guaranteed to all persons in this state.
>
> "(2) While the respondent insists that he is not unfriendly to the petitioners, and he can afford a fair and impartial trial, and while we do not doubt his sincerity in this regard, yet the question is not so much whether he feels and insists that he would be able to give a fair and impartial trial, as it is whether his utterances and actions have been such as to preclude reasonable men from feeling that a fair and impartial trial, without bias or prejudice, could be had before him. The basic principle upon which the law rests is that every litigant is entitled to have his contentions heard and his rights determined by an impartial, unbiased and unprejudiced tribunal."

The Circuit Court of Appeals in the case at bar, characterized the trial judge's remarks as "irritation."

Charges of dishonesty, breach of ethics, fraud allegedly perpetrated on the court, and sharp practice, involve something more than irritation.

Charges of that character necessarily prevent the litigant so charged, from receiving an impartial trial before the court making such charges. This would be particularly true in the case at bar where petitioner's credibility will come into question, in deciding the case.

We submit that such charges made in advance of evidence or trial, disqualify the judge who makes them, for he is no longer an impartial tribunal.

The fact that some of the charges of the trial judge were made against petitioner and others were made against petitioner's general counsel, does not change the rule in the case at bar. The trial court said in effect that the petitioner had condoned his general counsel's alleged "tactics."

There was never time nor opportunity given to meet the charges made by the court.

There should have been a hearing and inquiry before condemnation.

We accordingly submit that the District Judge should have been disqualified, and the dismissal of petitioner's suit without a trial, violated petitioner's right to have an impartial judge sit on his case. Petitioner consequently did not have due process.

III.

The Restraining Order, the Judge's Failure To Fix the Terms Of the Bond, and Permission Granted Petitioner's Trial Counsel To Withdraw At the Last Moment, Coupled With Order For Petitioner To Proceed To Trial, Was Unfair and Oppressive, and Deprived Petitioner Of Due Process.

In *Cook v. United States, 267 U. S. 517, 538,* no opportunity had been given to the respondent to hear certain charges made by the District Judge, until the respondent came into court. This court held that due process of law required that the respondent should be advised of the charges, that he should have an opportunity to meet them, have the assistance of counsel if desired, the right to call witnesses, and to give testimony. None of these things were permitted to the respondent in that case.

This court in reversing the judgment in *Cook v. United States*, said "we think the procedure pursued was unfair and oppressive to petitioner."

In *Cook v. United States*, the petitioner's alleged wrongful act consisted of a personal letter written to the judge, and that letter was before the court. In the case at bar, there wasn't a scrap of evidence to sustain the charges of fraud, dishonesty and breach of ethics, made by the District Judge. In *Cook v. United States* this court held that the respondent was not given an opportunity to disprove the charges or explain them. So likewise in the

case at bar, there was no opportunity offered or given to petitioner, to disprove the charges which the court made against him.

A bond was ordered, and such bond as the order required, was furnished. Later, the party to be indemnified, asked for three changes in the bond and those changes were agreed upon. Thereupon the court stated upon the record that he would draw such an order as would be required to fix the exact terms of the bond (R. 175). But the trial judge never drew the order and consequently the exact changes in the terms of the bond were never fixed.

In the meantime, petitioner was restrained on the record from hiring other trial counsel and this left the matter of the protection of petitioner's litigation in serious confusion. While the District Judge intended that the restraining order should be dissolved by the bond, so far as any new trial counsel was concerned, the restraint was still of record.

The judge charged petitioner with running around and hiring lawyers without paying the ones he previously had, and ordered petitioner to proceed to trial represented by his general nonresident counsel, notwithstanding it was known by the court that the entire detail of the trial had been left to petitioner's local trial counsel, Atkinson & Donnelly.

Thereupon the District Judge excused petitioner's local trial counsel from acting further in the case, following a request on their part to withdraw after the District Judge made the charges against petitioner and his general counsel as alleged.

This action was one which, in the language employed by this court in *Cook v. United States,* created a situation unfair and oppressive to the petitioner. The remarks of the District Judge did not make for an impartial and calm judicial consideration of petitioner's case, and the judge's insistance that the petitioner go to trial under the circumstances here detailed, and proceed before him without his trial counsel, was a denial of due process to petitioner.

IV.

Dismissal Of Petitioner's Case With Prejudice, Without a Hearing On the Merits Or Notice Of Such Intended Action, Was a Denial Of Due Process.

Petitioner's nonresident general counsel, having left the detail of the preparation of the trial to the local trial counsel employed by petitioner for that purpose, advised the court that a week's time was wholly inadequate to proceed with the case. There was the unsettled situation with reference to the Griffin, Heal and Emery indemnity bond and the order restraining the hiring of other trial counsel; there was the question as to whether the trial judge was disqualified in view of his charges against petitioner and his general counsel; there were eleven major subjects involved on the merits in the litigation. There was also the need to find a suitable attorney who could undertake immediately the work of preparation and trial as and when the procedural difficulties were solved.

In the meantime the District Judge himself did nothing toward entering an order fixing the terms of the new bond demanded by Griffin, Heal and Emery. Until that order was entered, it was impossible to file the bond because Griffin, Heal and Emery had again changed their mind as to the terms, and until the bond was filed, the restraining order operated as an efficient restraint on petitioner in retaining new trial counsel.

The trial judge offered to permit petitioner's general counsel to proceed with trial, but Griffin, Heal and Emery did not voice approval or disapproval to this suggestion.

The court granted permission to Messrs. Atkinson and Donnelly to withdraw as petitioner's local trial counsel at the moment trial was to begin, without the consent of petitioner.

When petitioner's nonresident general counsel sought to explain that more than a week was necessary, and that it was impossible for petitioner to proceed in a week, and could not promise to proceed before the same District Judge, the judge dismissed petitioner's case with prejudice.

No evidence was taken as to any prejudice being suffered by the defendants. The District Judge said (R. 199):

> "I don't think that the witnesses have been put out. I suppose the fellow coming from Saginaw in coming down here will probably suffer a change of atmosphere; but people who come from Lansing ought to be tickled to death."

There was some talk about the Lansing Drop Forge Company being engaged on defense work, but the petitioner's lawsuit did not interfere with the transaction of that company's business, whether that business be war defense work or ordinary commercial work. There was no evidence offered to show legal prejudice to any of the defendants.

The parties approved an order setting this case for trial on June 17th, 1941, and the order provided that in case any party failed to proceed with the trial, that the case would be treated as a default case (R. 121).

This follows the rule in *Brown v. Fletcher* in which Certiorari was denied by this court, reported in *220 U. S. 611, 31 Sup. Ct. 715.* In that case, the United States Circuti Court of Appeals stated the rule that the proper course, where a plaintiff failed to go ahead with his case (and there was no reason shown for adjournment), "was to dismiss the action for want of prosecution."

This rule is also followed in:

Pueblo, etc., v. Archieluto, 64 Fed. (2d) 812 (10th Circuit);
Patting v. Spring Valley Coal Company (7th Circuit), 98 Fed. 812;
Shaw v. Birk (5th Circuit), 67 Fed. (2d) 851.

We submit that petitioner being without notice that his case was to be dismissed on the merits and having had no opportunity to frame an issue or to offer evidence for the protection of his rights, has not had his day in court. He has been denied due process of law.

The dismissal on the merits, when no trial was had and no evidence was offered to show legal prejudice to defendants, was not justified on the record nor was such dismissal justified in view of the court's order that the case would be treated as a default matter.

Under the circumstances the dismissal on the merits deprived petitioner of due process.

V.

The United States Circuit Court of Appeals Erred In Failing To Apply This Court's Rule Laid Down In *Swan Land & Cattle Company v. Frank, 148 U. S. 603.*

The parties in the case at bar, consented to an order made May 22, 1941, that June 17, 1941, be the date peremptorily set for trial, and that the case may be treated as a default case, as to any party who does not appear for trial (R. 121).

Under *Swan Land & Cattle Company v. Frank,* this court established its rule that it is the general practice when a bill of complaint is dismissed without consideration of the merits, to state in the decree that the dismissal is without prejudice.

Notwithstand the case at bar was to be disposed of, as a default case if a party failed to appear, the United States Circuit Court of Appeals sanctioned a decree of dismissal on the merits, on the basis of its own rule

in *Olsen v. Muskegon Piston Ring Company, 117 Fed. (2) 162.* The rule in that case cannot have application to the case at bar, because many facts were shown in that case, by testimony taken in open court, from which it appeared that large and serious loss would be entailed, if the nonappearing plaintiff were merely defaulted. There was no evidence of any such situation in the case at bar. No testimony was taken to support a dismissal on the merits.

Under these circumstances, this court's general rule was applicable to the case at bar, and the United States Circuit Court of Appeals erred in applying its own special rule as laid down in *Olsen v. Muskegon Piston Ring Company,* in the case at bar.

VI.

The Affidavit Of Bias and Prejudice Filed By the Petitioner Against the Trial Judge Was Legally Sufficient Under Section 21 Of the Judicial Code.

(1) The affidavit of prejudice was timely.

The Circuit Court of Appeals, in its opinion, supra, at page 444, stated:

> "A motion to disqualify a judge under Section 21 of the Judicial Code 28 U. S. C. A., Section 25, must be filed ten days before the beginning of the term, or as soon as practicable before the term begins, or if the disqualifying facts are not discovered before its beginning, as soon thereafter as practicable."

The affidavit of prejudice in this case was filed by the petitioner upon the discovery of the disqualifying facts as soon after June 17, 1941, as practicable.

It could not have been filed before June 17, 1941, since for the first time at those proceedings petitioner became convinced that the trial court had carried over its prejudice against him and his case. The Judicial Code, Section 21, recognizes good cause for the failure to file an affidavit of bias and prejudice less than ten days before or after the beginning of the term of court.

On its face, the affidavit presents good cause for the failure to file it not less than ten days before the beginning of the term or before the trial.

The affidavit of bias and prejudice filed by petitioner (R. 201) presents such good cause:

> "That he did not file this affidavit ten days before the beginning of the present term of court or ten days before the trial of this case, to-wit: June 17th, 1941, for the reason that the bias and prejudice of said judge did not crystallize and plaintiff's knowledge thereof did not become complete and clear until June 17th, 1941; that on several occasions prior thereto, plaintiff had requested his attorneys to prepare and file an application to disqualify his honor, Judge Frank A. Picard, from presiding at the trial of his case, but that said attorneys disagreed with plaintiff and advised him that whatever prejudice was evident against plaintiff and his cause would disappear from the mind of the judge at the trial of the case; however, on the 17th day of June, 1941, the matters and things hereinafter set forth occurred, clearly showing to the plaintiff that Judge Frank A. Picard had

carried over his prejudice against plaintiff; that on said date, June 17th, 1941, Alexander H. Schullman, counsel for plaintiff, requested that said judge disqualify himself and requested leave to file an affidavit for said purpose, which the court denied; plaintiff alleges that the absence of knowledge that the bias and prejudice would be carried over and would be evident on June 17th, 1941, is good cause for his failure to file said affidavit within ten days before the beginning of the term or before said date."

A leading case on the subject, *Morris v. United States, 26 Fed. (2d) 444 (C. C. A. 8—1928)*, recognized such good cause for delay in filing an affidavit of prejudice. At page 449 of the *Morris case* the court said:

"From the affidavit it appears that much of the matter and many of the facts recited were within the knowledge of the defendant, A. B. Morris, before a considerable time before the trial. The affidavit recites that on several occasions, defendant requested his attorneys to prepare and file application to disqualify the trial judge but that his attorneys disagreed with him (and it is inferable that defendant yielded to his counsel) until the 20th day of July, 1927, when affiant received new information which was imparted to his attorneys * * *."

The good cause presented in the *Morris case* is similar to the good cause presented in the instant petitioner's affidavit of prejudice, and we believe that the affidavit should have been adjudged legally sufficient.

To the same effect see *Nations v. United States, 14 Fed. (2d) 507 (1926).*

The trial court knew that he was charged with prejudice. Petitioner requested leave to file an affidavit therefor (R. 177), which was denied. An exception was taken to the final decree at the proceedings (R. 200) and said exception was specifically incorporated in the final decree (R. 138, 139).

Particularly in a case of this kind, when no trial on the merits has been had and when petitioner has been seriously aggrieved, good conscience and equity compel a recognition of the sufficiency and proper filing of the affidavit. It could not have been filed before June 18, 1941, since several days elapsed before the transcript was furnished; the remainder of the time was utilized in the preparation of a motion of the petitioner to set aside the decree of the court, in the preparation of the affidavit of bias and prejudice, and in attempting to secure local counsel to join in the filing of the affidavit of prejudice (R. 141).

We submit that the affidavit was and is legally sufficient, was properly filed, and that the trial court should have proceeded thereunder in accordance with Judicial Code, Section 21.

(2) The affidavit of prejudice should have been judicially recognized as sufficient in conformity with the intent and purpose of Judicial Code, Section 21.

In *Bishop v. United States, 16 Fed. (2d) 410 at 411 (C. C. A. 8—1926)*, a criminal case and dissimilar in facts, the court, in discussing the affidavit of prejudice, stated:

> "Every case is governed to a large extent by the particular facts thereof."

We submit that the instant case and the facts are dissimilar from every case on the subject that has come to our attention. In the various cases wherein an affidavit of prejudice was not entertained because of tardy filing, the objection was either to the interference with the court in the trial of the case or to the filing for purpose of delay.

The record in this case is conclusive that petitioner did not seek delay but desired trial of his case by a judge.

The matters covered by petitioner's affidavit of prejudice in the case at bar were within the knowledge of the trial court on June 17, 1941, and at all times until the actual physical filing.

On June 17, 1941, a motion for leave to file such an affidavit was made and denied (R. 177); the decree dismissing petitioner's case with prejudice was entered on June 18, 1941, incorporating petitioner's exception thereto (R. 138, 139) and said decree evolved out of and was the proximate result of the trial court's refusal to consider petitioner's charge of disqualification; on June 27, 1941, a motion to set aside and vacate the order dismissing the bill of complaint (R. 139-144) was filed, and referred to therein were details of the charges of prejudice against the court, the fact that an attempt would be made to secure local counsel (R. 144) and the fact that an affidavit of prejudice would be filed in advance of the hearing date of the motion (R. 144).

The cases cited by the Circuit Court of Appeals in its opinion are inapplicable to the facts in this case.

In Ex Parte American Steel Barrel Company, 230 U. S. 35 (1913), the judge had disqualified himself and the objection was to rulings made by a second judge who was assigned the case, the objection being that the second judge had no jurisdiction since the disqualification of the first judge was improper. The facts of this case are entirely dissimilar and inapplicable to the instant case.

In *Shea v. United States, 251 Fed. 433 (C. C. A. 6)*, Shea was convicted of a conspiracy to use the mails. The proceeding in the appellate court was brought to review a second conviction upon an indictment. The court said at page 435:

> "The affidavit was purposely held back and its use on the eve of trial resorted to for the purpose of securing a postponement."

In the instant case, the reason and need for the affidavit became manifest on June 17, 1941; oral request was made for leave to file such affidavit, and after the dismissal with prejudice, petitioner proceeded to secure transcript, prepare his motion to set aside the decree, and secure local counsel. This required time. Petitioner was diligent in the actual filing of the affidavit of prejudice and no injury resulted from the lapse of the few days required to draw the affidavit and file it.

We submit that the affidavit of prejudice was filed in this case as soon as practicable upon discovery of the disqualifying facts and therefore was properly filed.

CONCLUSION.

Petitioner was entitled to have his rights adjudicated by an impartial judge and not by a judge who has charged him with dishonesty, breach of ethics, sharp practice, and fraud allegedly perpetrated on the court (either committed by petitioner or condoned). These charges were not appealable rulings but were statements made at various times quite disconnected with any trial of the case. The record does not sustain the charges made.

Petitioner's Affidavit of Prejudice was prepared and filed as soon as transcript could be obtained and the necessary preparation made for its filing. No injury resulted to anyone from the lapse of a few days required for that purpose. Good and sufficient grounds were shown why the affidavit could not have been filed ten days before the term of the court. On the basis of said affidavit the District Judge should have disqualified himself and not having done so the United States Circuit Court of Appeals should have ordered his disqualification.

Petitioner was also seriously aggrieved by the action of the trial court which restrained petitioner's trial counsel from proceeding with petitioner's case and agreed to fix the terms of a bond which was to release the restraint, and failed to do so, and then permitted petitioner's trial counsel to withdraw at the last moment, and ordered petitioner's nonresident general counsel who had not prepared the detail for the trial, to go ahead with the trial, and still left the matter of the bond and restraint unsettled. Such action was unduly prejudicial to petitioner's

rights, was unfair and oppressive, and deprived petitioner of due process. The United States Circuit Court of Appeals should have reversed the decree of the District Court on this ground.

We submit that if petitioner's case was to have been dismissed at all (as it should not have been) then the rule of this court laid down in *Swan Land and Cattle Company v. Frank, 148 U. S. 603,* should have been applied by the United States Circuit Court of Appeals for the Sixth Circuit, and any such dismissal should have been without prejudice. There was no evidence whatsoever of legal prejudice to defendants, shown on the hearing. There were no facts from which such prejudice could be inferred. The petitioner was given notice by the court's order, that if he did not proceed, his case would be treated as a default case and such treatment under the rule in *Swan Land & Cattle Company, supra,* would require a dismissal without prejudice.

Petitioner had no such reasonable notice as the law requires, to permit him to meet a supposed issue on the question of dismissal on the merits, or for taking any needed testimony, or meeting any charges made by defendants or by the court against petitioner.

By reason whereof petitioner submits that he is entitled to a review by certiorari, of the said decision of the United States Court of Appeals for the 6th Circuit, and a reversal of that decree.

Respectfully submitted,

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